

Minutes

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING

Tuesday, July 16, 2019

Location: 955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Persons Present: Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), Clarence Labor (OEA Board Chair), Patricia Hobson Wilson (OEA Board Member) (via telephone), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), Dionna Lewis, Wynter Clarke (OEA Paralegal), Zakia Nesbit (OEA Legal Intern), and Lema Gang (OEA Legal Intern).

- I. **Call to Order** – Clarence Labor called the meeting to order at 11:07 a.m.
- II. **Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. **Adoption of Agenda** –Dionna Lewis moved to adopt the Agenda. Peter Rosenstein seconded the motion. The Agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The May 28, 2019 meeting minutes were reviewed. There were no corrections. The minutes were accepted.
- V. **New Business**
 - A. **Public Comments on Motion to Expedite**
 1. There were no public comments offered.
 - B. **Summary of Case**
 1. **Frances Wade v. Department of Behavioral Health, OEA Matter No. 1601-0067-15R19**— On June 7, 2019, Employee filed a Motion to Expedite her case. She asserts that Agency's repeated appeals of the AJ's decisions have caused her to suffer financially and mentally during the four-year appeal process. Employee also states that the issues Agency has requested the Board to review are limited and have already been briefed in her previous Petition for Review or before the AJ, prior to the issuance of the Initial Decision on Remand.
 - C. **Public Comments on Petitions for Review**
 1. There were no public comments offered.
 - D. **Summary of Cases**
 1. **Madeleine Francois v. Office of the State Superintendent of Education, OEA Matter No. 1601-0007-18** — Employee worked as a Bus Attendant for Agency. On September 18, 2017, Agency terminated Employee for “(1) Any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law; (2) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations; specifically: misfeasance; (3) Any other on-duty or employment-related reason for corrective or adverse action this is not arbitrary or capricious; (4) Any act which constitutes a criminal offense whether or not the act results in a conviction.”

Employee filed a Petition for Appeal with the Office of Employee Appeals on October 13, 2017. She argued that her removal was unwarranted because of Agency's lack of evidence to prove the adverse action charges. Accordingly, Employee requested that she be reinstated to her position.

On November 6, 2017, Agency filed its Answer to Employee's Petition for Appeal. It claimed that Employee inappropriately handled a student and that she was loud and used profane language while being interviewed by an investigator. According to Agency, another student witnessed Employee and the bus driver put their hands on the student. Agency explained that Employee's behavior violated its policies and procedures against touching students. Therefore, Agency requested that Employee's appeal be denied.

The OEA Administrative Judge held an evidentiary hearing on April 3, 2018. After considering the testimonies and documentary evidence provided, the AJ ruled that Agency did not have cause for its adverse action against Employee. She found that Agency failed to utilize the 2016 version of the District Personnel Manual. The AJ explained that there were substantive differences in the charges and penalties for adverse actions in the 2012 and 2016 versions of the regulation. Because Agency failed to levy the charges under the appropriate DPM version, she ruled that it was a harmful procedural error. Furthermore, the AJ found that there was no proof that Employee committed an act that constituted a criminal offense or an act that was a violation of law. Therefore, she ruled that there was no cause for the adverse action via DPM § 1603.3(h). Moreover, she held that Agency failed to prove the charge of misfeasance against Employee. She found Employee's testimony regarding the use of profanity to be credible. As a result, she determined that the penalty of termination was inappropriate. Accordingly, she reversed Agency's removal action and ordered that Employee be reinstated to her position and reimbursed all back pay and benefits.

On December 3, 2018, Agency filed a Petition for Review of the Initial Decision. Agency asserts that it relied on the investigator's report in determining the appropriate discipline. It provides that after interviewing three students, the investigator concluded that force was used against a student. Moreover, Agency contends that the AJ did not afford the appropriate weight to the consistency of the statements from the students. It is Agency's position that the AJ discounted the students' statements while failing to consider that Employee and the bus driver had "something to lose from testimony that a student was inappropriately touched." Additionally, Agency opines that the AJ substituted her judgment for its choice to terminate Employee. It claims that Employee willfully disregarded its policies and procedures through her on-duty conduct, resulting in a dereliction of duty, as well as an on-duty or employment-related reason for corrected or adverse action that is not arbitrary or capricious. Finally, Agency reasons that its use of the 2012 version of Chapter 16 of the DPM was harmless error. It is Agency's position that it would have terminated Employee even under the 2016 version, as removal is still within the range of penalty for a first offense of conduct an employee should reasonably have known was a violation of law. Accordingly, Agency requests that its removal action be upheld.

Employee filed her response to the Petition for Review on January 7, 2019. She argues that Agency did not present new evidence to support its removal action and contends that Agency is attempting to re-litigate the facts. Employee also submits that the AJ did not substitute her judgement for that of Agency; however, the AJ exercised her authority to make credibility determinations. Employee contends that Agency's argument regarding a substitution of judgment lacks warrant because the AJ did not

offer that a different penalty be imposed, like suspension. She found that it lacked cause to terminate her. Further, Employee contests Agency's assertions that its use of the 2012 DPM was harmless error. Additionally, Employee provides that the AJ's decision was based on substantial evidence; that the record demonstrates that the investigative process was sloppy; and that the investigative reporting was inaccurate. Therefore, she requests that Agency's petition be denied.

2. **Rachel George v. Office of the Attorney General, OEA Matter No. 1601-0050-16** – Employee worked as a Support Enforcement Specialist with Agency. On February 24, 2016, Agency issued an Advance Notice of Proposed Removal to Employee for “failing to satisfactorily perform one or more of the duties of [her] position” and “any on-duty employment-related act or omission that interferes with the efficiency or integrity of operations.” The charges were based on Employee's failure to successfully complete a Performance Improvement Plan. On April 20, 2016, Agency issued its Final Decision on Proposed Removal. Her termination became effective on April 25, 2016.

Employee filed a Petition for Appeal with the Office of Employee Appeals on May 24, 2016. In her appeal, Employee argued that her removal was not taken for cause and that Agency could not prove that the charges were supported by the evidence. Therefore, she requested that she be reinstated with back pay, benefits, and attorney's fees.

Agency filed its answer on August 10, 2016. It claimed that the charges forming the basis of Employee's appeal were fully justified because she failed to successfully satisfy the directives outlined in her PIP. As a result, it believed that Employee was properly terminated.

An Initial Decision was issued on October 22, 2018. The AJ held that Agency's termination action could not be sustained because it failed to comply with the mandatory language of District Personnel Manual §§ 1410.1 through 1410.7, which governs the guidelines for PIPs. The AJ deemed the language of DPM § 1410.6 to be mandatory in nature; therefore Agency's failure to issue a written decision regarding Employee's results within ten days after the end of the PIP period triggered the invocation of DPM § 1410.6, which provides that an employee is deemed to have met the PIP requirements if an agency fails to issue a written decision within the prescribed time period. With respect to the penalty, the AJ reasoned that even if she found that Employee was disciplined for cause, the penalty was not appropriate. Consequently, its termination action was reversed, and Employee was ordered to be reinstated to her previous position with back pay and benefits.

Agency filed a Petition for Review with OEA's Board on November 26, 2018. It argues that there is substantial evidence in the record to support a finding that Employee failed to meet the requirements of her PIP and that she was advised by her supervisors on a weekly basis of her performance deficiencies. Agency also submits that the AJ erred by failing to determine whether its failure to issue a written decision regarding the results of Employee's PIP within ten days constituted a harmless error. Agency explains that it was never advised that the AJ was going to consider the Hearing Officer's April 11, 2016 Report and Recommendation in rendering a decision. As a result, it asks that the Board grant its Petition for Review and reverse the Initial Decision.

Employee also filed a Petition for Review with OEA's Board on November 21, 2018. She argues that she was unable to present certain documents during the evidentiary

hearing; that her prehearing statement was altered by her former attorney; and that the September 26, 2017 and December 15, 2017 prehearing conferences were not recorded. Employee also asserts that Agency’s actions were criminal and that she was threatened, intimidated, retaliated against, and terminated without cause.

Agency filed a Reply Brief on December 27, 2018. It maintains that Employee was properly terminated because her performance was deficient during the 2015 fiscal year. It restates its previous arguments detailing why Employee failed the requirements of her PIP. Agency denies any allegations of misconduct or improprieties with respect to acts of fraud or forgery purportedly committed by Agency’s managers and other employees. As a result, Agency maintains that the Initial Decision should be reversed.

On December 31, 2018, Employee filed an answer to Agency’s reply brief. She echoes her previous arguments regarding Agency’s alleged retaliatory actions and issues with the implementation and execution of her PIP. Employee also makes numerous claims pertinent to specific work duties which formed the basis of her termination and, Agency’s alleged prohibited personnel actions.

E. Deliberations – After the summaries were provided, Dionna Lewis moved that the meeting be closed for deliberations. Peter Rosenstein seconded the motion. All Board members voted in favor of closing the meeting. Clarence Labor stated that, in accordance with D.C. Official Code § 2-575(b)(13), the meeting was closed for deliberations.

F. Open Portion of Meeting Resumed

G. Final Votes – Clarence Labor provided that the Board considered all of the matters. The following represents the final votes for each case:

1. Frances Wade v. Department of Behavioral Health

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor	X			
Patricia Hobson Wilson	X			
Jelani Freeman		X		
Peter Rosenstein		X		
Dionna Lewis	X			

Three Board Members voted in favor of granting Employee’s Motion to Expedite. Therefore, the motion was granted.

2. Madeleine Francois v. Office of the State Superintendent of Education

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		
Dionna Lewis		X		

Five Board Members voted in favor of denying Agency’s Petition for Review. Therefore, the petition was denied. Accordingly, Agency is ordered to reinstate Employee and reimburse her all back pay and benefits lost as a result of her termination.

3. Rachel George v. Office of the Attorney General

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		
Dionna Lewis		X		

Five Board Members voted in favor of denying Agency’s Petition for Review. Therefore, the petition was denied. Accordingly, Agency is ordered to reinstate Employee and reimburse her all back pay and benefits lost as a result of her termination.

H. Public Comments – There were no public comments offered.

VI. Adjournment – Peter Rosenstein moved that the meeting be adjourned; Dionna Lewis seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor adjourned the meeting at 12:11 p.m.

Respectfully Submitted,
Wynter Clarke
Paralegal Specialist